Filed 9/20/16 In re D.S. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.S., Defendant and Appellant.	E064470 (Super.Ct.No. RIJ1500358) OPINION

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge. Affirmed as modified.

Jill Kent, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

On August 11, 2015, the juvenile court found true the allegation that defendant and appellant D.S. (minor) orally copulated J.B. (Pen. Code § 288, subd. (a).[1]) Minor was adjudged to be a ward of the court pursuant to Welfare and Institutions Code[2] section 602 and was placed in the care, control, and custody of the probation officer. The court committed him to juvenile hall for not less than 86 days, satisfied by time served, and ordered him placed in "foster/group home, relative home, [or] county or private facility." On appeal, minor challenges the sufficiency of evidence to support the court's true finding, along with four of his probation conditions. We conclude the evidence was sufficient; however, we agree that the challenged probation conditions must be stricken or modified.

I. FACTS

In July 2014, J.B. was eight years old. His grandmother lived next door to minor and minor's mother. On July 20, 2014, J.B. and his mother were at minor's mother's

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[1] Penal code section 288, subdivision (a), in relevant part, provides that "[A]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."

[2] All undesignated statutory references are to the Welfare and Institutions Code. Section 602, provides in relevant part: "(b) Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses shall be prosecuted under the general law in a court of criminal jurisdiction: [¶] . . . [¶] (2) The following sex offenses, if the prosecutor alleges that the minor personally committed the offense, and if the prosecutor alleges one of the circumstances enumerated in the One Strike law, subdivision (d) or (e) of Section 667.61 of the Penal Code, applies: [¶] . . . [¶] (D) Forcible lewd and lascivious acts on a child under 14 years of age, as described in subdivision (b) of Section 288 of the Penal Code."

home in her garage. After minor asked permission, J.B. was allowed to go to minor's bedroom to play video games. Minor closed the door and the two began playing video games.

At some point, minor asked J.B. to pull down his pants and underwear. J.B. complied. Minor orally copulated J.B.'s penis for some minutes. Minor had also covered J.B.'s head with a blanket. After minor took the covers off of J.B.'s head, he showed J.B. a video of naked grown-ups "doing things to each other." He also asked J.B. to suck his (minor's) penis. J.B. did not want to do so and said he had to go to the bathroom. J.B. went to the bathroom and then went downstairs to get away.

J.B. walked back to his grandmother's house and told his brother what minor had done. He then told his mother. J.B.'s mother confronted minor's mother and minor. The conversation became intense, and minor's mother called the police.

The police came to minor's home and J.B. talked to them. J.B. told the police that he had seen minor do the same thing to two girls. The parties stipulated that if the girls were called to testify, they would say that minor never touched them in an inappropriate manner. J.B. went to the hospital to see a SART[3] nurse, who took photos of and swabs from J.B.'s penis, scrotum, anal area, and mouth.

Stephanie Carpenter, a criminalist with the Department of Justice in Sacramento, examined the swabs from J.B., as well as one reference swab from minor, and provided expert testimony. Minor "could not be excluded" as a contributor of the DNA profiles

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[3] SART stands for Sexual Assault Response Team. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 840.)

found on two swabs. Ms. Carpenter characterized the evidence as strongly supporting minor being the source of the DNA found on J.B. Although Ms. Carpenter detected no amylase (a substance found in saliva and other bodily fluids) on the penile or scrotal swabs, she explained that the "amount of amylase in people's saliva varies between individuals, between each other, as well as at different times of the day depending on what your saliva is doing in your mouth [for example,] if you have eaten, you would expect amylase or more amylase to be present." She concluded that minor's DNA came to be on J.B.'s skin through either primary (direct) contact or secondary transfer. Secondary transfer results when one person's DNA ends up on a second person through an intervening source, such as a third person, or by the second person touching an object handled by the first person.

The defense expert, Blaine Kern, a laboratory director at Human Identification Technologies, examined Ms. Carpenter's test results. Mr. Kern testified that if a swab were taken from a person within hours after being orally copulated, and the person had not bathed since the act, he (Mr. Kern) would expect to see saliva on the swab. The testing solution used to detect the presence of amylase is sensitive. Mr. Kern agreed that the lack of amylase does not support an allegation of oral copulation. However, he also agreed that minor could not be excluded as the donor of a DNA profile on two swabs. In his opinion, there was no way to tell if minor's DNA was deposited on J.B.'s swabs through primary or secondary transfer. Mr. Kern explained that Person B's body could test positive of Person A's DNA by way of secondary transfer, which he explained

happens when Person A habitually uses a PlayStation controller, Person B then uses the same controller, and Person B touches himself later on.

Minor testified on his own behalf. On July 20, 2014, minor was 15 years old. He denied molesting J.B. or making him remove his clothing. Minor testified that J.B. had been over to play PlayStation a number of times and that he (minor) left the door open when other kids came over. Minor testified that if his DNA showed up on swabs taken from J.B., then it was inadvertently transferred onto to J.B. from the PlayStation controller. However, when the police initially interviewed minor, he posited that his DNA may have gotten onto J.B. through minor's spit because minor had a habit of spitting in his room.

II. DISCUSSION

A. Sufficiency of the Evidence.

Minor contends the evidence is insufficient to support the trial court's true finding that he violated Penal Code section 288, subdivision (a), because J.B.'s testimony was facially improbable, contradictory and not supported by the physical evidence. We disagree.

The standard of proof in juvenile wardship proceedings is the same as that required in adult criminal trials. In reviewing a challenge to the sufficiency of the evidence underlying a wardship adjudication, we consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision and not whether the evidence proves guilt

beyond a reasonable doubt. Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*In re Arcenio V.* (2006) 141 Cal.App.4th 613, 615-616.) "Before the judgment of the trial court can be set aside for insufficiency of the evidence . . . it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

J.B. testified on the stand and in his interview with police that minor orally copulated him. Both experts agreed there was strong evidence that minor was the source of the DNA found on J.B.'s penis. Nonetheless, minor asserts that J.B.'s testimony was facially improbable because he told the police a different story from the one he told at trial; J.B. testified that he had seen minor do the same thing to two neighbor girls who, by way of stipulation, denied that minor had molested them; and the prosecution's expert's testimony "lacked ponderable legal significance and was not reasonable in nature, credible, and of solid value."

J.B. testified that he previously told a police officer something different from his trial testimony; however, there is no direct evidence of what J.B. actually told the officer. This alleged discrepancy does not render J.B.'s trial testimony that minor orally copulated him (J.B.) inherently improbable. It may impeach his credibility. But under California law, it is the "exclusive province" of the trier of fact "to determine the credibility of a witness and the truth or falsity of the historical facts." (*In re Anthony C.*

(2006) 138 Cal.App.4th 1493, 1504.) The same applies to minor's testimony that he had seen minor orally copulate two neighbor girls who denied such contact.

Regarding the physical evidence of minor's contact with J.B., the experts offered contrary opinions. Ms. Carpenter opined the lack of amylase on the swab did not mean that saliva was not present, while Mr. Kern opined the absence of saliva on the swab meant that it was highly unlikely that minor had J.B.'s penis in his (minor's) mouth. Both agreed that the tests could not show if minor's DNA got onto J.B.'s penis by direct or secondary contact. On appeal, minor faults Ms. Carpenter's inability to "tell the court how, short of amylase, one could identify saliva, a bodily fluid, because such a determination was not within the realm of her expertise." He asserts that such failing "leaves a gap in the connection between the deposit of DNA—particularly where a plausible secondary transfer scenario existed—and J.B.'s allegations." Not so.

While minor cites cases supporting his statement that "[h]igh amylase activity is consistent with oral copulation," none of the cases holds that without amylase there can be no oral copulation. (*People v. Panah* (2005) 35 Cal.4th 395, 414-415 ["The stains also showed amylase activity that was consistent with saliva."]; *People v. Snow* (2003) 105 Cal.App.4th 271, 276, fn. 5 ["Amylase is a component found in high concentration in saliva, but also can be found in perspiration, feces, mucous membranes or areas where bodily secretions are present."]; *People v. Kaurish* (1990) 52 Cal.3d 648, 672 [presence of large concentration of amylase leads to conclusion that murderer put mouth on victim].) According to Ms. Carpenter, the amount of amylase in a person's saliva varies and the absence of amylase does not mean there is no saliva present. Moreover, we reject

minor's attempt to discredit Ms. Carpenter's testimony based on Mr. Kern's testimony that her mathematical equations were inaccurate. Ms. Carpenter agreed with Mr. Kern that the DNA for the sample at issue was too low to yield any results. Therefore, despite their mathematical disagreement, both experts agreed on the ultimate fact, namely, that the sample was too low to yield any results.

Notwithstanding the expert testimony, J.B. testified that minor orally copulated him (J.B.). The testimony of a single witness is sufficient to establish a disputed factual point. (*People v. Cudjo* (1993) 6 Cal.4th 585, 608.) We conclude the trial court's finding of lewd and lascivious conduct is supported by substantial evidence.

B. Probation Conditions.

Minor argues that four of his conditions of probation are unconstitutional because they are vague and overbroad. These conditions are as follows:

1. "Not be on the following premises or areas: [XXXXX XXXXXXXXX XXXX], Moreno Valley, CA 92553 unless accompanied by parent(s)/guardian(s)."

2. "Have no contact with any male or female under the age of 14 years, unless accompanied by an informed, responsible adult, approved by the Probation Officer."

3. "Not possess sexually explicit materials."

4. "Not possess or have immediate access to weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, knives and pepper spray."

When a minor is adjudged a ward of the court on the ground that he or she is a person described by section 602, the court may place the ward on probation without the

supervision of the probation officer, and to impose "reasonable conditions of behavior as may be appropriate under this disposition." (§ 727, subds. (a)(1), (2).) "A juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile. [Citation.] That discretion will not be disturbed in the absence of manifest abuse. [Citation.]" (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5.) However, "the juvenile court's discretion in formulating probation conditions is not unlimited." (*In re D.G.* (2010) 187 Cal.App.4th 47, 52.) Under the void for vagueness doctrine, based on the due process concept of fair warning, an order "'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "In addition, the overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation." (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

Any objection to the reasonableness of a probation condition is forfeited if not raised at the time of imposition. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 814.) Constitutional challenges to probation conditions on their face, however, may be raised on appeal without objection in the court below. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 887-889.)

1. Home Alone Condition.

Minor contends the condition keeping him from his home unless his parent or guardian is present should be stricken, because it is overbroad and operates as a temporary banishment by prohibiting him "from going home after school if his mother is either at work, running errands, or otherwise away." He adds that if his mother "works the night shift or goes out socializing," he necessarily violates one of two probation conditions: "either the condition that he not be at home without his parent or the condition that he not leave his house after 10:00 p.m. without a parent." We agree that this condition is overbroad and acts to temporarily banish minor from his home. "Conditions of banishment affect the probationer's basic constitutional rights of freedom of travel, association and assembly. [Citations.] Thus, in order to survive constitutional scrutiny, such conditions not only must be reasonably related to present or future criminality, but also must be narrowly drawn and specifically tailored to the individual probationer." (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084; see *In re James C.* (2008) 165 Cal.App.4th 1198, 1205 [banishment of a juvenile from the United States was unconstitutional because it was neither narrowly drawn nor specifically tailored to the juvenile's circumstances].) Here, the imposition of probation conditions are to restrict minor's access to an environment where he will be alone with children under the age of 14 years. Such purpose is met by the condition prohibiting him from contacting "any male or female under the age of 14 years, unless accompanied by an informed, responsible adult, approved by the Probation Officer." Thus, the probation condition that minor "[n]ot be on the following premises or areas: [XXXXX XXXXXXXXX XXXX],

Moreno Valley, CA 92553 unless accompanied by parent(s)/guardian(s)" is invalid and should be stricken.

2. Contact Condition.

Minor contends the condition that he "[h]ave no contact with any male or female under the age of 14 years, unless accompanied by an informed, responsible adult, approved by the Probation Officer" is flawed, because it does not require his knowledge of the age of the persons with whom he is contact, and it does not require his knowledge that he is in "'contact'" with such a person. The People disagree, arguing that the word "'contact'" is analogous to the word "'associate'" and that an additional knowledge requirement is unnecessary. We agree with minor and hereby modify the condition to read: "Have no knowing contact or association with any person minor knows or reasonably should know is under the age of 14 years unless he is accompanied by an informed, responsible adult approved by the probation officer."

3. Possession of Sexually Explicit Condition.

Minor contends the condition prohibiting him from possessing sexually explicit materials is unconstitutionally vague, as it "lacks a knowledge requirement as to possession and neglects to include a requirement that [he] know what materials are considered 'sexually explicit.'" The People do not object to a modification; however, they assert that "an additional knowledge requirement is unnecessary." Again, we agree with minor, and hereby modify the condition to read: "Not knowingly possess sexually explicit materials that your probation officer has informed you are sexually explicit or as

defined by the California Code of Regulations, title 15, section 3006, subdivision (c)(17)."[4]

4. Possession of Weapons Condition.

Minor contends the condition prohibiting possession of weapons is unconstitutionally vague, because it fails to include a knowledge requirement and because the word "'weapon'" could mean innocuous objects. The People disagree. We agree with the People that the definition of what is a "weapon" is fairly well established, and thus whether a particular object is a weapon is easily ascertained by the probationer, the courts, and those tasked with supervising the probationer. In *People v. Graham* (1969) 71 Cal.2d 303, our Supreme Court set forth two categories of weapons. The first made up of knives, guns, brass knuckles, etc. that are "'"dangerous or deadly" to others in the ordinary use for which they are designed . . . . This is true as the ordinary use for which they are designed establishes their character as such.'" (*Id*. at p. 327.) The second category, of which minor here complains, are objects "not ordinarily used as weapons but

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[4] California Code of Regulations, title 15, section 3006, subdivision (c)(17) defines sexually explicit materials as follows: "Sexually explicit images that depict frontal nudity in the form of personal photographs, drawings, magazines, or other pictorial format. [¶] (A) Sexually explicit material shall be defined as material that shows the frontal nudity of either gender, including the fully exposed female breast(s) and/or the genitalia of either gender. [¶] (B) The following sexually explicit material shall be allowed: [¶] 1. Departmentally purchased or acquired educational, medical/scientific, or artistic materials, such as books or guides purchased by the department for inclusion in institution libraries and/or educational areas; or [¶] 2. Educational, medical/scientific, or artistic materials, including, but not limited to, anatomy medical reference books, general practitioner reference books and/or guides, National Geographic, or artistic reference material depicting historical, modern, and/or post modern era art, purchased or possessed by inmates and approved by the institution head or their designee on a case-by-case basis."

that could be used as such." The examples he includes are household objects such as pencils, screwdrivers, pillows, automobiles, nail files, wrench and leather thong. Such objects are considered weapons when they are capable of being used as a weapon, and it appears from the circumstances that the person possessing the object intends to use it as a weapon. (*Id*. at pp. 327-328.) For example, a reasonable person would know that a pencil possessed during an academic class is not a weapon, whereas a pencil carried into a fight would be a weapon. Thus, because a reasonable person would know what is a weapon and what is not, we conclude that this condition is not unconstitutionally vague.

Nonetheless, we are concerned with the lack of a knowledge requirement. While a probation term should be given "the meaning that would appear to a reasonable, objective reader" (*People v. Bravo* (1987) 43 Cal.3d 600, 606), in an abundance of caution, we modify the condition to read: "Not knowingly possess or have immediate access to weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, knives and pepper spray."

III. DISPOSITION

The trial court is ordered to strike the probation condition that reads: "Not be on the following premises or areas: [XXXXX XXXXXXXXX XXXX], Moreno Valley, CA 92553 unless accompanied by parent(s)/guardian(s)." The court is further ordered to modify (1) the "no contact" condition to read: "Have no knowing contact or association with any person minor knows or reasonably should know is under the age of 14 years unless he is accompanied by an informed, responsible adult approved by the probation officer"; (2) the possession of sexually explicit materials to read: "Not knowingly

possess sexually explicit material that your probation officer has informed you are sexually explicit or as defined by the California Code of Regulations, title 15, section 3006, subdivision (c)(17)"; and (3) the possession of weapons to read: "Not knowingly possess or have immediate access to weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, knives and pepper spray."

In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.